SINGAPORE REPORTS

MALAYAN PLANT (PTE) LTD. v. MOSCOW NARODNY BANK LTD.

[C.A. (Chua, Choor Singh and Rajah JJ.) April 14, 1978]
[Singapore — Civil Appeal No. 26 of 1977]

Company Law — Winding-up — Debt due and owing — Discretion of judge — Companies Act (Cap. 185), ss. 218 & 221.

This was an appeal from a winding-up order made by the Chief Justice on a winding-up petition brought by the respondent bank. The respondent bank claimed that the appellant company was indebted to the bank in the sum of $8,092,088.96 together with interest thereon until date of payment in respect of loans and advances made by the bank. The Company claimed that its current assets totalled $18,665,916.99 and its current liabilities totalled $17,183,039.81.

Held: where a debt is due and owing on which a winding-up petition can properly be founded the onus of persuading a judge not to make a winding-up order is on the debtor company and this is entirely a matter within the discretion of the judge, whose discretion could not be interfered with on appeal unless he had erred on principle.

Cases referred to:-

(1) *In re L.H.F. Wools Ltd.* [1970] 1 Ch. 27.

(2) *In re P & J Macrae Ltd.* [1961] 1 W.L.R. 229.

COURT OF APPEAL.

John Newey Q.C. (*B. Mohan Singh* with him) for the appellants.

Lai Kew Chai (*Miss D. Barker* with him) for the respondents.

Mohamed Harith bin Mohammad Kassim for the Official Receiver.

Rajah J. (delivering the judgment of the Court): This appeal arises out of a winding-up order made by the learned Chief Justice on a winding-up petition, under the Companies Act (Cap. 185) (hereinafter referred to as "the Act") brought by a creditor, the Moscow Narodny Bank Ltd. of Nos. 48/56 Robinson Road, Singapore, a banking corporation incorporated in the United Kingdom (hereinafter referred to as "the Bank"), against Malayan Plant (Pte) Ltd. (hereinafter referred to as "the Company").

The Company was incorporated on February 9, 1972 under the Act and its registered office was at 215 Upper Bukit Timah Road, 7¼ m.s. Singapore 21. The nominal capital of the Company was $10,000,000 divided into 10,000,000 shares of $1 each. The amount of the capital paid up or credited as fully paid was $1,770,000. The Bank averred that the Company was indebted to the Bank in the sum of $8,092,088.96 together with interest thereon until date of payment in respect of loans and advances made by the Bank.

On January 27, 1977 the Bank caused a statutory demand under section 218(2)(a) of the Act to be made on the Company in respect of that said debt. The Bank then went on to present a petition for the winding-up of the Company on February 21, 1977 founded on section 218(1)(e) of the Act — "the company is unable to pay its debt".

It was claimed by the Company that, as at December 31, 1976, and this was not challenged by the Bank, its current assets totalled $18,665,916.99 and its current liabilities totalled $17,183,039.81.

The petition came on for hearing before the learned Chief Justice in the usual way on Friday, May 12, 1977. Present at the hearing, beside counsel for the Bank and the Company, were counsel representing a supporting creditor in the sum of $12,362.40, counsel for Deekes & Evans Limited, an English company, an opposing creditor in the sum of $1,795,793.58, counsel for all contributories except for 1 share and the Official Receiver, on whom the petition had been served. After hearing arguments of counsel for both the Bank and the Company the learned Chief Justice made a winding-up order against the Company and appointed the Official Receiver provisional liquidator.

Against this order the Company now appeals. The Petition of Appeal set out a number of grounds of appeal. At the hearing of the appeal, Mr. John Newey, Q.C. appearing for the Company informed the court that he did not challenge the statutory notice of demand nor any of the debts in respect of which the demand had been made. This having been done the appeal proceeded on the issue of whether the learned Chief Justice had exercised his discretion according to, as it was put by Mr. Newey, the *Buckley* concept or the modern concept as propounded by the Court of Appeal in the case of *In re L.H.F. Wools Ltd.*[1] (hereinafter referred to as "the *Wools Case*"). Mr. Newey submitted that the learned Chief Justice was wrong in that he had based his decision on the *Buckley* concept rather than on the said modern concept, which he should have done. On the question of discretion both counsel were agreed that a judge has discretion as to whether or not he will make the winding-up order, but they were not agreed as to the matters which the judge could take into consideration in exercising discretion. Mr. Lai Kew Chai, counsel for the Bank, clearly and quite understandably, held a narrow and restricted view while Mr. Newey, again quite understandably, took a more generous and extended view and submitted that on the modern concept the learned Chief Justice should have taken into consideration the following matters:—

(1) That the Bank was a secured creditor of the Company up to $1.2 million under a legal mortgage;

(2) The Bank's rights to recoup itself under the Trust Receipts, such as they were, at the date of the petition;

(3) That the Company was solvent;

(4) That the Company had been making profits prior to the presentation of the petition;

(5) The future earning prospects of the company;

(6) That the Bank's general behaviour in this matter was not that of a good and reasonable banker, *vis-a-vis* its customer, in that it had made it too easy for the Company to become indebted to it in the sum of over $8 million and, worse still, to ask the Company to pay off the debt in three weeks, in one lump sum; and

(7) That the Official Receiver as liquidator would have difficulty in getting in the assets whereas the Company has a better chance of recovering the debts due and owing to it.

It therefore becomes necessary to examine both the *Buckley* concept and the *Wools Case.*

The *Buckley* concept, as we understand it, is set out at page 450 of *Buckley* on The Companies Act (13th Edition 1957). It is this: —

"A creditor who cannot obtain payment of his debt is entitled as between himself and the company *ex debito justitiae* to an order if he brings his case within the Act. He is not bound to give time. And, notwithstanding a voluntary winding up, on proving his judgment and that it remains unsatisfied he will be so entitled.

'It is not a discretionary matter with the court, when a debt is established and not satisfied, to say whether the company shall be wound up or not; that is to say, if there be a valid debt established, valid both at law and in equity. One does not like to say positively that no case could occur in which it would be right to refuse it, but ordinarily speaking, it is the duty of the court to direct a winding up.'

As between himself and the company the unpaid creditor who proves insolvency is entitled to a winding up order, an order equivalent to equitable execution by virtue of which he by the hands of a liquidator seizes his debtor's assets and administers them for payment of himself and other creditors. It is no defence in the company's mouth to say there are no assets or that the debenture-holders as secured creditors will sweep them all away."

And now for the *Wools Case.*

"A company bought wool from a Belgian merchant. It paid for the wool by accepting a bill of exchange drawn by the merchant on a Belgian bank and payable to the bank. The wool was never delivered and the bill was dishonoured on presentation. The merchant was made bankrupt and convicted for fraud. In an action by the bank against the company on the bill, the company counterclaimed, pursuant to the Belgian civil code, damages against the bank for negligently giving credit to the merchant at a time when it should have realised that he was insolvent. That counterclaim was not a cause of action known to English law. At the trial the company abandoned its counterclaim and submitted to judgment for the amount of the bill and interest, taking the view that it would be cheaper and easier to prosecute its claim against the bank in Belgium. The judge refused a stay of execution (partly on the ground that the matter would be better dealt with by the companies court in the event of a petition to wind up), and the bank presented a petition to wind up the company. There were no supporting or opposing creditors. The company had ceased trading after the merchant's bankruptcy and, apart from its claim in Belgium against the bank, had no assets. After the petition the company instituted an action in Belgium against the bank which could not be brought to trial until after an appeal by the merchant against his conviction had been finally concluded. A director of the company deposed that another creditor of the merchant in Belgium, who was making a like claim against the bank, had agreed to finance the company's action in Belgium. On the hearing of the petition the company sought to have the petition adjourned or dismissed, but Plowman J. refused and made a winding-up order." (Page 27).

The company appealed against the winding-up order made by Plowman J. on the ground that the company had a cross-claim in Belgium against the bank (Banque de Bruxelles) which, if it were successful, would overtop the bank's debt and wipe it out altogether. As Harman L.J. said,

"This is the kind of case which is always troublesome and depends in the ultimate resort on the discretionary views of the judge who tries it and, therefore, one has to find, if this court is going to upset what he decided, that he exercised his judgment on some wrong principle — that is to say, either that he took too much account of something put to him or that he took no account of something else which ought to have taken into account." (Page 36A).

It will be noted immediately that the issues in the instant case and that in the *Wools Case* are entirely different. In the instant case the learned Chief Justice had to exercise his discretion on the direct question of whether he should exercise his discretion in favour of the petitioning creditor on the debtor company's inability to pay its debt (section 218(1)(e) of the Act), there being no cross claim by the company against the petitioning creditor whereas in the *Wools Case* what the court was called upon to do was to exercise its discretion in favour of the debtor company on its cross-claim, which, if successful, would overtop the petitioning creditor's debt and wipe it out altogether. It was in these circumstances that Harman L.J. said,

"The bank has a judgment debt: it is, therefore, entitled *ex debito justitiae* to a winding-up order. This is not, in the ordinary case, there being no other circumstances, a discretionary matter, but where there is in fact a cross claim such as in the present case, or where there are for instance competing creditors on one side or the other, it always comes down in the end to a matter for the discretion of the judge." (Page 37 C-D).

In our judgment, where a debt is due and owing on which a winding-up petition can properly be founded the onus of persuading a judge not to make the winding-up order is firmly on the debtor company and this is a matter entirely within the discretion of the judge, whose decision could not be interfered with on appeal unless he had erred in principle. In the *Wools Case* there was a *bona fide* cross-claim overtopping the debt due and as the Court of Appeal was of the view that the learned judge in exercising his discretion had erred in principle they allowed the appeal, discharged the winding-up order and stood the petition over with leave to either party to restore. To quote Harman L.J. again:—

"The company appeals on the ground that according to modern practice if there is a genuine cross claim, it is just as if there was a disputed debt; and, as everybody knows, a disputed debt is never good subject-matter for a petition.

The main support for that proposition is *In re* Portman Provincial Cinemas Ltd. (1964) 108 Sol. J 581, a case in which I myself was one of the judges and the majority, consisting of myself and Russell L.J. decided, Lord Denning M.R. dissenting, that the petition should be rejected. The difference was on what was the right view of the facts about the cross claim in that case. We all agreed on what the law was, and Lord Denning M.R. stated it like this:

'As I understand the law on the matter, it is this: if this is a genuine cross claim with substance in it, then let it be tried out in the Queen's Bench Division: this petition must be rejected. But if there is no substance in the cross claim, then let the court do justice to the petitioners in this case and not give heed to so insubstantial a cross claim.'

I used much the same language myself, and so did Russell L.J. The majority decided in that case that, shadowy as the cross claim was and improbable as the events said to support it seemed to be, there was just enough to make the principle work, namely, that it was right to have the matter tried out before the axe fell." (Page 36 B-E).

Mr. Newey relied yet again very strongly on the case of *In re P. & J. Macrae Ltd.*[2] Here again the petition was presented by an unsatisfied judgment creditor which gave him a *prima facie* right to a winding-up order. The onus of preventing such an order being made shifted to the debtor company. In this case, the majority of creditors, both in number and value, opposed the making of the winding-up order but filed no evidence as to the grounds of opposition. The county court judge held that the bare fact of a majority both in number and value of creditors was not in itself sufficient to deprive the petitioning creditor of his right, and in the exercise of his dis-

cretion made the winding-up order. The debtor company appealed to the Court of Appeal where it was held (Upjohn L.J. dissenting) that the county court judge had exercised his discretion on the correct principles and, accordingly, there was no ground for interfering with the order made. Here again in the instant case and the county court case, as indeed also in the *Wools Case*, the issues are different. The matter of the exercise of the discretion in the county court case again arose on the issue of whether the debtor company and its supporting creditors had raised an issue on which the petitioner should be denied his *prima facie* right to the winding-up order. Upjohn L.J. in his dissenting judgment has this to say,

"Where a creditor has proved his right against the company to a winding-up order *ex debito justitiae*, but other creditors of the company have expressed conflicting views as to the desirability of winding it up, the judge has conferred on him a discretion by section 346 of the Companies Act, 1948 (Our section 289 of the Act), which leaving out immaterial words, provides: 'The court may have regard to the wishes of the creditors as proved to it by any sufficient evidence.' The discretion is permissive and not mandatory, and is in terms complete and unfettered. However, it is a discretion which must be exercised judicially, and the court is not entitled arbitrarily to disregard the wishes of the creditors as proved to it." (Page 237).

In the instant case the question of a majority of creditors opposing the petition was not put in issue by creditors of the company. The law which the learned Chief Justice had to administer in the instant case is set out in sections 218 and 221 of the Act.

In these circumstances we are of the view that we should not interfere with the learned Chief Justice's exercise of his discretion. We accordingly dismiss the appeal, the costs of the respondent to come out of the assets of the company.

Appeal dismissed.

Solicitors: *B. Mohan Singh & Co.; Lee & Lee.*

CHNG HEN TIU & ANOR. v. SIME DARBY HOLDINGS LTD.

[O.C.J. (D'Cotta J.) March 16, 1978]
[Singapore — Case Stated No. 2 of 1977]

Arbitration — Case stated — Contract for sale of building complex — Payment in form of shares — Condition that shares should be listed in stock exchanges — Failure to comply with condition — Breach of contract — Rescission — Whether contract affirmed — Estoppel — Restitutio in integrum.

The claimants and the respondents had made an agreement for the sale of shares in a company which owned a building complex in Singapore. Under the comprehensive bargain (a) the claimants agreed to sell their shares in the complex to the respondents for $50 million to be paid partly in cash and partly by 4 million fully paid Sime Darby shares; (b) the respondents agreed to arrange at the request of the claimants a placement of $8 per share of the 4 million Sime Darby shares should the market price fall below $8 per share; (c) the respondents undertook to arrange a loan of up to $32 million to the claimants by a consortium of banks. It was a term of the sale agreement that the respondents should obtain the approval for listing of the shares in all stock exchanges which list Sime Darby shares. The respondents did not in fact obtain approval for the listing of the shares on the Stock Exchange of Malaysia. The claimants learned on April 3, 1976 that the respondents had not obtained listing approval in Kuala Lumpur and on May 10, 1976 they wrote to the respondents rescinding the contract. The claimants claimed a return of their shares in the complex. The dispute between the parties was referred to arbitration by an arbitrator who referred a Special Case stated to the court. The case stated was whether on the facts found and the true construction of the contractual bargain between the parties the claimants were entitled to the relief claimed by them. The learned arbitrator came to the conclusion on the facts that the respondents were obliged to obtain the approval of the Kuala Lumpur stock exchange for the listing of the 4 million Sime Darby Shares within a reasonable time and that the respondents had failed to do so. He also found that the claimants should have exercised but failed to exercise their rights to rescind the arrangements within a reasonable time. He found that the claimants by their subsequent conduct had chosen to affirm the share sale agreement and were therefore bound by it. The learned arbitrator further held that the claimants were estopped from rescinding the agreement and that by May 10, 1976 *restitutio in integrum* was no longer possible.

Held: (1) the respondents were obliged to obtain the approval of the Kuala Lumpur Stock Exchange for the listing of the 4 million Sime Darby shares and a term should be implied in the agreement that they should do so within a reasonable time;

(2) on the other hand there was no obligation on the part of the claimant to exercise their right to rescind the agreement within a reasonable time;

(3) in this case the claimants rescinded the contract five weeks after they discovered that listing approval had not been obtained. This was in the circumstances a reasonable time;

(4) in the totality of the circumstances the acts of the claimants in making payments under the contract during the time when they were considering their position after finding that the listing approval had not been obtained did not constitute affirmation of the contract;

(5) the respondents were not estopped from rescinding the agreement;

(6) *restitutio in integrum* was possible;

(7) the claimants were entitled to the reliefs they claimed.

Cases referred to:-

(1) *Schuler A.G.* v. *Wickman Machine Tool Sales Ltd.* [1974] A.C. 235.

(2) *Trollope* v. *N.W. Metropolitan Hospital Board* [1973] 1 W.L.R. 601.

(3) *McComick & Anor.* v. *National Motor and Accident Insurance Union Ltd.* 49 Ll.L.R. 361, 365.

(4) *Farnworth Finance Facilities* v. *Attryde & Anor.* [1970] 2 All E.R. 774.

(5) *Re Salkeld* 12 Ad. & E. 767.

(6) *Woodhouse A.C. Israel Cocoa Ltd.* v. *Nigerian Produce Marketing Co. Ltd.* [1972] A.C. 741.

CASE STATED.

Lai Kew Chai (*Eddy Teng Jong Pu* with him) for the claimants.

Raymond Kidwell Q.C. (*J. Grimberg* with him) for the respondents.

D'Cotta J.: This matter comes before the court in two aspects, first as an award in the form of a Special Case Stated by the Arbitrator, Mr. Robert MacCrindle, Q.C., and secondly by way of motion to remit the award to the Arbitrator. The question for my decision in the Case Stated is —

"Whether on the facts found and the true construction of the contractual bargain between the parties the claimants are entitled to the relief claimed by them or to any of it."

Subject to the decision of this court, the learned Arbitrator has awarded and adjudged that the claimants' claims failed and stood dismissed. If this court should answer the question in the affirmative, the learned Arbitrator has made the alternative award in favour of the claimants and has also granted to the claimants such further or other relief as to this court may seem proper.